

	OAH Docket No. 15-1901-19909-2 MN OSH Division Docket No. 9345
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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Steve Sviggum, Commissioner, Department of Labor and Industry, State of Minnesota, Complainant, vs. Salrecon, LLC, Respondent.	DECISION AND ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

The above-entitled matter is before Administrative Law Judge (ALJ) Beverly Jones Heydinger, on the Department of Labor and Industry's Motion for Default Judgment. The Department filed its motion on September 22, 2008, and renewed the motion on November 25, 2008, after Salrecon, LLC, failed to respond. The record on the motion closed on November 25, 2008.

Rory H. Foley, Assistant Attorney General, represented the Department of Labor and Industry (Department or Complainant). Salrecon, LLC (Respondent), made no appearance.

Based upon the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That the contested Citation and Notification of Penalty against Respondent are **AFFIRMED**;
2. The Department of Labor and Industry's motion for default judgment is **GRANTED**;
3. The Respondent shall immediately pay \$60,000.00 to the Minnesota Department of Labor and Industry at the following address: Department of Labor and Industry, Minnesota OSHA Compliance, 443 Lafayette Road North, Saint Paul, MN 55155;

4. The Respondent shall immediately abate any outstanding violations in the above citation within ten days of this Order.

Dated this _17th_ day of December, 2008.

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat. §§ 182.661, subd. 3, and 182.664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

MEMORANDUM

On November 16, 2007, Minnesota Occupational Safety and Health (MN OSHA) inspectors responded to the report of a serious injury at a building in the process of demolition located at LTV Pellet Plant, CR 666, Hoyt Lakes, Minnesota.¹ Respondent was responsible for the work being done at the worksite. The safety inspection continued until February 26, 2008.

On March 13, 2008, the Commissioner served a Citation and Notification of Penalty upon the Respondent's office at Biwabik, Minnesota, in care of Mark Sutich, Respondent's Project Manager, at the worksite located at the LTV Pellet Plant, CR 666 in Hoyt Lakes, Minnesota.² The citation included three willful violation and three serious violations. MN OSHA assessed \$17,500 in penalties for each of the willful violations, and \$2,500 in penalties for each of the serious violations. The total monetary penalties assessed were \$60,000. The citation informed Respondent of its right to a hearing to contest the violations in citation by filing a Notice of Contest with the Commissioner within 20 calendar days of receiving the citation.³

On March 28, 2008, Respondent delivered a Notice of Contest and Service to Affected Employees to the Complainant's Duluth Office.⁴ On June 25, 2008, Complainant served a Summons and Complaint on Respondent by mail.⁵ The Summons informed Respondent that it was required to serve an answer to the Complaint on the Commissioner within 20 days after service of the Summons. Respondent was further informed that failure to file an answer might constitute a waiver of its right to participate in this proceeding. Respondent's answer was due on July 15, 2008. On July 29, 2008, Respondent's counsel contacted the Department and asked that the Summons and Complaint be re-served. The Department re-served the

¹ Foley Aff., Ex. C (Complaint).

² Foley Aff., ¶ 2; Ex. A (Citation and Notification of Penalty).

³ *Id.*

⁴ Foley Aff., Ex. B (Notice of Contest and Service to Affected Employees).

⁵ Foley Aff., Ex. C (Complaint).

Summons and Complaint upon Respondent's counsel on that date.⁶ Respondent never filed an answer.

On September 22, 2008, the Department filed a motion for default judgment. On September 30, 2008, Respondent filed a Suggestion of Bankruptcy in this proceeding. The Suggestion of Bankruptcy indicated that Respondent had filed for bankruptcy in Alabama on February 20, 2008. The Suggestion indicated that this proceeding should be stayed pursuant to 11 U.S.C. § 362. The Suggestion was signed by Respondent's Bankruptcy Council, Robert D. McWhorter, Jr.

Mr. Foley and Mr. McWhorter participated by telephone in a prehearing conference held on October 24, 2008. The parties agreed that Respondent would file a Notice of Appearance by November 25, 2008, and confirm in writing that its representative had been in contact with Mr. Foley. The parties agreed that if Respondent did not file a Notice of Appearance by that date, a default judgment would be entered. The ALJ sent a letter to the parties on October 27, 2008, in which she set forth the terms and deadlines agreed upon during the prehearing conference. The letter specifically advised that if the Notice of Appearance was not filed by November 25, 2008, "a default will be entered." The letter also explained that even though Respondent had "filed for bankruptcy under Chapter 11 in United States Bankruptcy Court in Alabama (Case No. 08-40340-JJR11)," it was unclear whether that filing "prohibited this administrative enforcement action from proceeding in Minnesota," and that Respondent must file a Notice of Appearance "to prevent a default in this action." The letter was mailed to the parties and Mr. McWhorter, Respondent's bankruptcy council.

Respondent never responded to the October 27, 2008, letter and never filed a Notice of Appearance. On December 1, 2008, Complainant renewed its motion for default judgment.

The Department's motion for default judgment is based on Minn. R. 5210.0570, subps. 4 and 5. Subpart 4 provides:

Within 20 days after service of the complaint, the party...against whom the complaint was issued shall file with the commissioner an answer and serve the answer on every other party.

The answer must contain a short and plain statement denying those allegations in the complaint that the party intends to contest and assert any and all affirmative defenses. Any allegation not denied is deemed admitted and any affirmative defense not asserted is deemed waived.

If the Respondent fails to file a timely answer, subpart 5 permits the ALJ, upon motion by a party, to enter an order affirming the contested citation and notification of penalty. The Department argues that Respondent's failure to file an answer to the complaint is grounds for default judgment under Minn. R. 5210.0570, subp. 5.

Respondent has not filed an answer to the Complaint. Because Respondent did not file an answer, the allegations contained in the Complaint are deemed admitted, and

⁶ Foley Aff., ¶ 6-7.

any affirmative defenses are deemed waived pursuant to Minn. R. 5210.0570, subp. 4 (2008). Accordingly, Respondent violated 29 C.F.R. 1926.850(a), as described in Citation 1, item 1; 29 C.F.R. 1926.850(b), as described in Citation 1, item 2; 29 C.F.R. 1926.859(g), as described in Citation 1, item 3; 29 C.F.R. 1926.21(b)(2), as described in Citation 2, item 1; 29 C.F.R. 1926.501(b)(1), as described in Citation 2, item 2; and 29 C.F.R. 1926.503(a)(1) and (2), as described in Citation 2, item 3. The violations were properly classified under Minn. Stat. §§ 182.653 and 182.651, subd. 12. The proposed penalties were properly issued pursuant to Minn. Stat. § 182.661, subd. 1, and the amount of the penalties are appropriate and reflect consideration of the employer's size, the employer's good faith, the employer's violation history, and the gravity of the violation alleged, as required by Minn. Stat. § 182.666, subd. 6.

Moreover, the Department is entitled to default judgment under Minn. R. 1400.6000. Under that rule governing contested case hearings, a "default occurs when a party fails to appear without the prior consent of the judge at a prehearing conference, settlement conference, or a hearing, or fails to comply with any interlocutory orders of the judge." Here, Respondent failed to comply with the Judge's order to file a Notice of Appearance by November 25, 2008. Respondent is therefore in default under Minn. R. 1400.6000. The contested citation and notification of penalty are affirmed.

B. J. H.